Supreme Court, U.S.
FILED
NOV 18 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 619

HENRY M. JUNG, JOHN H. JUNG, ARTHUR E. SERWICH, HEDRICH-BLESSING, Ltd., an Illinois corporation, and GILBERT R. SHELDON, individually and as trustee under agreement dated July 21, 1952,

Petitioners,

VS.

K. & D. MINING CO., Inc., a corporation of the State of Washington, M. L. DAVIES (sometimes known as MYRON L. DAVIES), ALICE F. DAVIES, GEORGE C. KOSMOS, individually and as trustee, and YVONNE KOSMOS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ZEAMORE A. ADER,
100 North LaSalle Street,
Chicago 2, Illinois
Attorney for Petitioners.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LA KEVIEW 5-6561

INDEX

	PAGE
Date of the judgment sought to be reviewed, order respecting rehearing and character of proceedings below	1-2
The Opinion Below	2
Jurisdiction	2
The Statutes Involved	2
Questions Presented	3
Summary Statement	4-6
Reasons for Granting the Writ	7
I. An order of the United States District Court dismissing a complaint (not the cause of action) and at the same time granting leave to amend the complaint is not a final and appealable order within the statute providing that, "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . " (28 U.S.C.A. Sec. 1291) (App. 6A), and The Court of Appeals for the Seventh Circuit in holding that the said order dismissing the complaint (not the cause of action) and at the same time granting leave to amend was a final and appealable decision is not only in conflict with the applicable rulings of this Court but also is in conflict with the rulings of the United States Court of Appeals for the Second Circuit	7-12

PAGE

II.

A final order dismissing the cause of action is necessary to terminate a pending case in a district court where an order is entered dismissing the complaint with leave to amend but no amendment is filed in the time specified, and the Court of Appeals for the Seventh Circuit in holding that an order of dismissal of the cause is unnecessary is not only in conflict with the applicable rulings of this Court but also is in conflict with rulings of the United States Courts of Appeals for the Second, Eighth and Tenth Circuits 12-15

III.

The district court did not intend to terminate the litigation until that court entered the order settling the matter of cost and dismissing the cause of action and The Court of Appeals for the Seventh Circuit in holding that the district court intended to terminate the litigation at an earlier time is in conflict with the applicable rulings of this Court 16-19

IV.

The court of appeals opinion below makes it virtually impossible to know when the time for filing notice of appeal begins to run and has departed from the accepted and usual course of judicial proceedings 19-20

PAGE

V.

The court of appeals opinion below severely reduces the jurisdiction of district courts, harshly limits liberality of amendments intended by Rule 15(a), Federal Rules of Civil Procedure (App. 7A) and is in conflict with the rulings of the United States Courts of Appeals for the Third, Fourth and Sixth Circuits 20-22

VI.

The order dismissing the cause of action and settling the matter of costs was a final and appealable decision and the court of appeals below in refusing to hold that this order was a final and appealable decision which drew with it a review of the interlocutory order dismissing the complaint is in conflict with the rulings of United States Courts of Appeal for the Third and Fifth Circuits 22

Conclusion 24

Appendix 1A-14A

CITATIONS.

Cases.

Asher v. Ruppa, 7th Cir., 173 F. 2d 40 17

Canister Co., et al. v. Beahy, et al., 3rd Cir., 191 F. 2d 255 21

City & County of San Francisco v. McLaughlin, 9th Cir., 9 F. 2d 390 ..... 9, 13

Clark v. Kansas City, 172 U.S. 334 ..... 9, 13, 15

Copeland Motors Co. v. General Motors Corp., 5th Cir., 199 F. 2d 566 16

PAGE

Cory Bros. & Co. v. United States, 2nd Cir., 47 F. 2d 607 ..... 8, 13, 14, 15

Crutcher v. Joyce, 10th Cir., 134 F. 2d 809 15

Fidelity Trust Co. v. Board of Education of City of Chicago, 7th Cir., 174 F. 2d 642 ..... 11, 14, 17

Heay v. Phillips, 9th Cir., 201 F. 2d 220 22

Kelly v. Delaware River Joint Commission, 3rd Cir., 187 F. 2d 93 18

Leonard v. Socony-Vacuum Oil Co., 7th Cir., 130 F. 2d 535 10

McDowall v. Orr Felt & Blanket Co., 6th Cir., 146 F. 2d 136 21

Marconi Wireless Tel. Co. v. United States, 320 U.S. 1 ..... 14, 17

Maryland Casualty Co. v. Rickenbaker, 4th Cir., 146 F. 2d 751 21

Missouri & Kansas Interurban Railway Co. v. City of Olathe, Kansas, 222 U.S. 185 ..... 8, 13, 15

Morgan v. Thompson, 8th Cir., 124 F. 203 9

Reed Construction Co. v. Virginia Metal Products Corp., 5th Cir., 214 F. 2d 127 23

Riverside Oil & Refining Co. v. Dudley, 8th Cir., 33 F. 2d 749 15

Stewart v. Lincoln Douglas Hotel Corp., 7th Cir., 208 F. 2d 379 17

United States v. Hark, 320 U.S. 531 18

United States v. Newbury Mfg. Co., 1st Cir., 123 F. 2d 453 18

PAGE

Victor Talking Machine Co. v. George, 3rd Cir., 105 F. 2d 697 23

Western Electric Co. v. Pacent Reproducer Corp., 2nd Cir., 37 F. 2d 14 13

OTHER AUTHORITIES.

Barron & Holtzoff, Federal Practice and Procedure, Ch. 13, p. 359 23

3 Moore's Federal Practice, 1st Ed. 1938, 1939 10

Zoline's Federal Appellate Jurisdiction & Procedure, Sec. 21, p. 20 17

STATUTES.

15 U.S.C. Sec. 77f 4

15 U.S.C. Sec. 77v ..... (App. 9A)-4

15 U.S.C. Sec. 78j(b) 4

28 U.S.C. Sec. 1254 ..... (App. 5A)-2

28 U.S.C. Sec. 1291 ..... (App. 6A)-3, 7, 8, 10

28 U.S.C. Sec. 1292 ..... (App. 6A)-8, 22

28 U.S.C. Sec. 1653 ..... (App. 7A)-12

28 U.S.C. Sec. 2101 ..... (App. 5A)-2

RULES OF COURT.

Rules of United States Court of Appeals for the Seventh Circuit:

Rule 15(f) ..... (App. 7A)-2

Rule 25(a) ..... (App. 7A)-2

Federal Rules of Civil Procedure:

Rule 15(a) ..... (App. 7A)-12, 16, 20, 21, 22

Rule 73 ..... (App. 8A)-6, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

NO.

HENRY M. JUNG, JOHN H. JUNG, ARTHUR E. SERWICH, HEDRICH-BLESSING, Ltd., an Illinois corporation, and GILBERT R. SHELDON, individually and as trustee under agreement dated July 21, 1952,

Petitioners,

vs.

K. & D. MINING CO., Inc., a corporation of the State of Washington, M. L. DAVIES (sometimes known as MYRON L. DAVIES), ALICE F. DAVIES, GEORGE C. KOSMOS, individually and as trustee, and YVONNE KOSMOS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

All Italics Ours; (App.) means Appendix to this petition; (R. App.) means Appendix from Court of Appeals.

Petitioners Henry M. Jung, John H. Jung, Arthur E. Serwich, Hedrich-Blessing, Ltd., an Illinois corporation, and Gilbert R. Sheldon, individually and as trustee under agreement dated July 21, 1952, hereinafter sometimes called plaintiffs, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

the Seventh Circuit entered in this cause on July 26, 1957 (App. 1A); petitioners filed petition for rehearing on August 9, 1957 (App. 3A), within the 15 days allowed for petition for rehearing by Rule 25(a) of the Court of Appeals for the Seventh Circuit (App. 7A); the court amended its opinion by order entered August 14, 1957 (App. 2A); the judgment became final by order entered August 20, 1957, denying the petition for rehearing (App. 3A). The judgment granted motions of the respondents, hereinafter sometimes called defendants, to dismiss the appeal which the petitioners (plaintiffs) had taken from the District Court of the United States to the said Court of Appeals for the Seventh Circuit. The court of appeals below considered defendants' motion to dismiss under Rule 15(f) of that court on typewritten material without oral argument. (App. 6A).

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 246 F. 2d 281 and appended to this petition (App. 9A *et seq.*).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit became final on August 20, 1957, by denial of plaintiffs' petition for rehearing (App. 3A).

The jurisdiction of this Court is invoked under the provisions of Sections 1254 and 2101 of the Judicial Code, (28 U.S.C.A. Sec. 1254, 2101) (App. 5A).

THE STATUTES INVOLVED

The various statutes involved are set forth in the appendix.

QUESTIONS PRESENTED

1. Where an order was entered on May 10, 1955, dismissing plaintiffs' complaint and granting twenty days leave to amend and on May 27, 1955, the court overruled plaintiffs' motion to vacate said order dismissing the complaint and granted twenty days time to amend, no amendment having been filed within the twenty days, was said order overruling the motion to vacate, which at the same time granted leave to amend, a final decision appealable to the Court of Appeals of the United States for the Seventh Circuit under Section 1291 of the Judicial Code (28 U.S.C.A. Sec. 1291) (App. 6A)?

2. Where the district court granted leave to plaintiffs to stand on their complaint as amended, and thereupon entered a judgment order that the cause of action be dismissed and settled the matter of costs on March 25, 1957 (R. App. 33); was this a final decision from which plaintiffs could file notice of appeal to the said Court of Appeals of the United States?

3. When did the district court intend to terminate the litigation, when the district judge on May 10, 1955 (R. App. 30), dismissed the complaint and at the same time granted plaintiffs leave to amend, or when he on May 27, 1955 (R. App. 32), overruled plaintiffs' motion to vacate the order dismissing the complaint and there gave leave to amend in twenty days, or at a later time when he on March 25, 1957 (R. App. 33), granted plaintiffs leave to stand on their complaint as amended, settled the question of costs and dismissed the cause of action?

4. Did the district court lose jurisdiction of the cause by mere expiration of the time to file amendment to the complaint?

SUMMARY STATEMENT

Petitioners (plaintiffs), citizens and residents of the State of Illinois filed their complaint in the United States District Court for the Northern District of Illinois against respondents (defendants), citizens and residents of the State of Washington, to recover back money paid by plaintiffs to defendants for worthless securities sold by defendants to plaintiffs upon fraudulent misrepresentations of fact made by defendants to plaintiffs by use of communications in interstate commerce and the mails in violation of the *Securities Act of* 1933, as amended, including Sec. 22(a) thereof (U.S.C.A. Tit. 15, Sec. 771) and the *Securities Exchange Act of* 1934, as amended (U.S.C.A. Tit. 15, Sec. 78j(b)) (R. App. 5-23). The Securities Act confers jurisdiction on District Courts of the United States of suits in equity and actions at law brought to enforce liability in this class of cases in the district where the defendant is found, is an inhabitant, transacts business, or where the sale took place, and process in such cases may be served in any other district where defendant is an inhabitant or may be found (U.S.C.A. Tit. 15, Sec. 77v) (App. 9A). Defendants were served by personal service of summons and copy of complaint by the United States Marshal in the District and State of Washington where they were inhabitants and were found (R. App. 24, 25, 26), and service of summons was again made upon defendant corporation K. & D. Mining Company by service upon its agent and vice president in the Northern District of Illinois where he was an inhabitant and was found and where the case was pending (R. App. 24) by the United States Marshal for that district.

Defendants filed a motion in the district court to dismiss on July 30, 1954, alleging that the complaint did not

set forth a claim and that the court lacked jurisdiction of the defendants (R. App. 27, 28). Briefs were filed by both sides.

Plaintiffs on November 8, 1954, moved the court to set the defendants' motion to strike the complaint, as amended, for oral argument, and the court set the oral argument for November 24, 1954. (R. App. 28). (Actually, the trial court never allowed oral argument).

On May 10, 1955, the court dismissed plaintiffs' complaint, as amended, (not the cause of action) and further ordered, in the same order, "that the plaintiffs be and hereby are given twenty days from this date to file an amended complaint" (R. App. 30).

On May 27, 1955, plaintiffs moved the court to vacate the order dismissing the complaint, as amended, and to allow oral argument. As part of this motion, the plaintiffs asked, in the alternative, that the time for plaintiffs to file an amended complaint be extended (R. App. 34). The court on that date (May 27, 1955) overruled the motion to vacate the order dismissing the complaint and for oral argument and granted leave to plaintiffs to file amended complaint in twenty days (R. App. 32). Plaintiffs did not file further amendment.

On March 25, 1957, the plaintiffs made a motion, which the court allowed, for leave to stand on their complaint, as amended, and thereupon the court entered an order that "this cause of action be and it hereby is dismissed without costs" (R. App. 33).

On April 16, 1957, plaintiffs filed notice of appeal and appealed to the United States Court of Appeals for the Seventh Circuit from final judgment entered in this action on March 25, 1957, (R. App. 34, 35).

After the record and appendix were filed by plaintiffs in the Court of Appeals for the Seventh Circuit, defendants filed a motion in the court of appeals to dismiss the appeal contending (to quote the defendants' motion below) "that the order entered in this case on May 10, 1955, dismissing the complaint" (and which at the same time granted leave to amend) "was a final and appealable order". They contended that the thirty days time for appeal began to run from the order of May 27, 1955, (R. App. 32) which overruled plaintiffs' motion to vacate the order dismissing the complaint and for oral argument and which order, at the same time, granted leave to amend. Defendants then went on to say that since plaintiffs did not file notice of appeal from that order within thirty days (Rule 73, *Federal Rules of Civil Procedure*) (App. 8A) but instead filed notice of appeal from the order entered by the district court on March 25, 1957, (R. App. 33) dismissing the cause of action and settling the question of costs, that the court of appeals was without jurisdiction.

The Court of Appeals for the Seventh Circuit granted defendants' motion and dismissed the appeal. (App. 1-A).

REASONS FOR GRANTING THE WRIT

I.

AN ORDER OF THE UNITED STATES DISTRICT COURT DISMISSING A COMPLAINT (NOT THE CAUSE OF ACTION) AND AT THE SAME TIME GRANTING LEAVE TO AMEND THE COMPLAINT IS NOT A FINAL AND APPEALABLE ORDER WITHIN THE STATUTE PROVIDING THAT, "THE COURTS OF APPEALS SHALL HAVE JURISDICTION OF APPEALS FROM ALL FINAL DECISIONS OF THE DISTRICT COURTS OF THE UNITED STATES . . . " (28 U.S.C.A. SEC. 1291) (APP. 6-A),

AND

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN HOLDING THAT THE SAID ORDER DISMISSING THE COMPLAINT (NOT THE CAUSE OF ACTION) AND AT THE SAME TIME GRANTING LEAVE TO AMEND WAS A FINAL AND APPEALABLE DECISION IS NOT ONLY IN CONFLICT WITH THE APPLICABLE RULINGS OF THIS COURT BUT ALSO IS IN CONFLICT WITH THE RULINGS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The order entered on May 10, 1955 (R. App. 30) dismissing the plaintiffs' complaint and granting leave to amend, is not a final and appealable order. Nor is the order entered on May 27, 1955 (R. App. 32) overruling plaintiffs' motion to vacate the order dismissing the complaint and for oral argument, and which at the same time also gave plaintiffs leave to amend their complaint, a final and appealable order.

The United States Statutes on appeals from district courts to courts of appeal expressly provide that, "The courts of appeals shall have jurisdiction of appeals from

all final decisions of the district courts of the United States . . . ." (28 U.S.C.A. Sec. 1291) (App. 6A). (28 U.S.C.A. Sec. 1292 (App. 6A) permits appeals from district courts to courts of appeal from certain specified interlocutory decisions not pertinent here).

It is the duty of all United States Courts of Appeals to examine their jurisdiction, and if an order brought before it is not final and appealable as defined by law, to dismiss the appeal so that a final and appealable order may be entered by the trial court and a proper appeal at a later time be processed (*Cory Bros. & Co. v. United States*, 47 F(2) 607).

The rule that there is no final and appealable judgment in the Federal system where the plaintiff may amend his pleadings has consistently been enunciated by the Supreme Court of the United States. In *Missouri & Kansas Interurban Railway Company v. City of Olathe, Kansas*, 222 U.S. 185; 32 S. Ct. 46; 56 L. Ed. 155, a suit was brought by the Railway Company against defendant City. The defendant demurred to the petition as not stating a cause of action. The district court sustained the demurrer and was sustained by the State Supreme Court. The plaintiff sought to bring the case to the United States Supreme Court by writ of error. The United States Supreme Court dismissed the appeal, saying:

> "The record fails to disclose a final judgment. The Supreme Court affirmed the judgment of the lower court, but this *merely sustained the demurrer without dismissing the suit.* The Supreme Court did not direct its dismissal, but the cause was left standing in the court below for such proceedings as might be had according to law after the decision on the demurrer, either by amendment of the petition or entry of final judgment.

"As it does not appear from the record that the judgment sought to be reviewed was one which finally determined the cause, this court is without jurisdiction. *Miners' Bank of Dubuque v. United States*, 5 How. 213; *McComb, Executor v. Commissioners of Knox County*, 91 U.S. 1; *Great Western Telegraph Company v. Burnham*, 162 U.S. 339; *Haseltine v. Central Bank of Springfield*, 183 U.S. 130. Dismissed."

In *Clark v. Kansas City*, 172 U.S. 334, the United States Supreme Court considered a case where a demurrer to the petition was sustained below. The United States Supreme Court expressly ruled, after considering leading authorities, that *where the trial court has the power to grant amendment* to the petition "and may exercise it at the invocation of the" plaintiffs, there is no final and appealable judgment, and dismissed the appeal.

In *City & County of San Francisco v. McLaughlin*, 9 F(2) 390, the court held that a motion to dismiss a bill in equity when granted is like an order sustaining a demurrer at law and is not final. *There must be a final decree to be appealable*, before the Court of Appeals can acquire jurisdiction.

As Judge Sanborn said in *Morgan v. Thompson*, 124 F. 203:

". . . an order allowing an amendment as to the form of action is from its very nature interlocutory. Indeed, instead of terminating the case on the merits, it determines that the case shall proceed to trial. It is in no sense final; therefore it is not appealable. *Merriam v. C. & E. I. R. Co.*, C.C.A., 64 F. 535; *Stillwagon v. B. & O. R. Co.*, C.C.A., 159 F. 97; *Shumaker v. Security Life & Annuity Co.*, C.C.A., 159 F. 112; *Weaver v. Atlas Oil Company*, C.C.A., 39 F(2) 847; *Childs v. Ultramares Corporation*, C.C.A., 40 F(2) 474, 475."

An order dismissing a complaint and granting leave to amend does not finally terminate the case in the trial court; it is not a final and appealable order. The court in the case of *Leonard* v. *Socony Vacuum Oil Co.*, 7 Cir., 130 F(2) 535, had a question before it very similar to the one posed here. A defendant filed a motion for summary judgment in the trial court; the trial judge granted the motion and also ruled that plaintiff "might amend his complaint within thirty days". The plaintiff, without amending his complaint or further hearing appealed to the court of appeals. The court dismissed the appeal for the reason that there was no final and appealable order, saying:

> "Section 128 of the Judicial Code, 28 U.S.C.A. Sec. 225 provides that: 'The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal . . . final decisions . . . ' The Federal Rules have worked no modification of this provision. *Florian* v. *United States*, 7 Cir., 114 F(2) 990; *Huntsman* v. *New Orleans Public Service, Inc.*, 5 Cir., 119 F(2) 465."

The court then referred with approval to Professor Moore (3 *Moore's Federal Practice*, 1st Ed., 1938, 1939) and said that in his analysis of the Federal Rules, it was the view of the draftsmen to continue the former policy not to allow interlocutory appeals except where specifically provided for by Act of Congress.

The court further said that Federal Courts have uniformly held that motions to strike are not final and appealable, saying:

> "Despite such interlocutory orders, the suit or action is regarded as still pending and before the Court for final determination by final judgment before jurisdiction can be conferred upon the Court of review. *City & County of San Francisco* v. *McLaughlin*, 9 Cir., 9 F(2) 390; *Darling Lumber Co.* v. *Porter*, 5 Cir., 256 F. 455; *Missouri & Kansas Interurban R. Co.* v. *City of Olathe, Kan.*, 222 U.S. 185, 32 S. Ct. 46, 56 L. Ed. 155."

And in concluding its opinion, the court further said:

> "It should be observed that under the order complained of, plaintiff was given the right to amend within 30 days. Where the right to amend is given there is no 'final decision'. *Atwater v. North American Coal Corp.*, 2 Cir., 111 F(2) 125; *Western Electric Co. v. Pacent Reproducer Corp.*, 2 Cir., 37 F(2) 14."

In *Fidelity Trust Co. v. Board of Education of City of Chicago*, 7 Cir., 174 F(2) 642, the court followed the consistent rule of Federal Courts that a ruling which contemplates further action by the court is not final. In the case at bar, the trial judge entered an order granting plaintiffs leave to amend their complaint (R. App. 30) and later entered an order extending the time for plaintiffs to amend (R. App. 32). Obviously, *this contemplated further action* by the court. The court in the above case (*Fidelity Trust Co. v. Board of Education of City of Chicago*, 7 Cir., 174 F(2) 642) held that when an order contemplates further action by the court, it is not final. There, the court had entered a permanent injunction and made a reference to a Master for an account on July 13, 1937. More than ten years later, the plaintiff obtained leave to file an amended complaint in the trial court. The court, referring to the decree entered ten years before, said that since the trial court contemplated further action, it

> "was an interlocutory decree and the matter was *sub judice*, the District Court could at any time reconsider and reform its decree or any part thereof. *Marconi Wireless Tel. Co. v. United States*, *supra*, 320 U.S. 1, at page 47, 63 S. Ct. 1393, 87 L. Ed. 1731."

So in the case at bar, the case was pending in the trial court, was *sub judice*; the district court could at any time have reconsidered or reformed its order. The district court each time granted leave to amend the complaint or extended the time to amend and thereby expressly contemplated further action by the court. At any time, the

district court under Rule 15(a) Federal Rules of Civil Procedure (App. 6A) could have permitted amendments to be filed, the Rule providing that . . . "leave shall be freely given when justice so requires." Liberality of amendment is also stressed by statute providing that "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts" (28 U.S.C.A. Sec. 1653) (App. 7A).

Therefore, until the final order dismissing the cause of action and settling the question of costs (R. App. 33) which terminated the pendency of the case in the district court and from which appeal was taken in apt time, there was no final decision for appeal.

II.

A FINAL ORDER DISMISSING THE CAUSE OF ACTION IS NECESSARY TO TERMINATE A PENDING CASE IN A DISTRICT COURT WHERE AN ORDER IS ENTERED DISMISSING THE COMPLAINT WITH LEAVE TO AMEND BUT NO AMENDMENT IS FILED IN THE TIME SPECIFIED.

AND

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN HOLDING THAT AN ORDER OF DISMISSAL OF THE CAUSE IS UNNECESSARY IS NOT ONLY IN CONFLICT WITH THE APPLICABLE RULINGS OF THIS COURT BUT ALSO IS IN CONFLICT WITH RULINGS OF THE UNITED STATES COURTS OF APPEALS FOR THE SECOND, EIGHTH AND TENTH CIRCUITS.

The Court of Appeals for the Second Circuit has held in accordance with the decisions of the United States Supreme Court cited below, that a final order dismissing the cause is essential where an order was entered dismissing a complaint with leave to amend when the amendment is

not filed in the time specified. That court (Judges L. Hand, Swan and Chase, *per curiam*) said in *Cory Bros. & Co., Limited* v. *United States*, 47 F(2) 607, that, it "does not differ from an order sustaining a demurrer with leave to amend: *another order of absolute dismissal after expiration of the time allowed for amendment* is required to make a final disposition of the cause. Such orders are not appealable".

The court of appeals opinion below says (App. 11A, 12A) that there is "authority that another order is necessary after the time for amendment has passed in order to insure finality. See *Cory Bros. & Co.* v. *United States*, 47 F. 2d 607 (CA-2)". But the court below also said in its opinion that there is an "implication" that an order becomes final for the purpose of appeal upon expiration of the time for amendment, and cites *Western Electric Co.* v. *Pacent Reproducer Corp.*, 37 F. 2d 14 (CA-2) (App. 12A). Any such implication in this *Western Electric Co.* case was at best *obiter dicta*. Actually, that decision is authority against dismissal of the appeal below, for there an order was entered dismissing a bill with leave to amend in twenty days. An appeal was taken. The Court of Appeals for the Second Circuit held that there was *no final and appealable* order, *that the case remained pending in the district court*. The court said that an order granting leave to amend (p. 15):

> "contemplates and requires another order of absolute dismissal after expiration of the time allowed for amendment, if none has been filed".

The Second Circuit Court of Appeals further held there that the order was like one sustaining a demurrer and is non-appealable and cited *City and County of San Francisco* v. *McLaughlin*, 9 F. (2) 390; *Buch* v. *Siegel*, 31 F. (2d) 1008 (C.C.A. 2); *Clark* v. *Kansas City*, 172 U.S. 334, 19 S. Ct. 207, 40 L. Ed. 467; *Missouri & K. I. Ry. Co.* v. *Olathe*, 222 U.S. 185, 32 S. Ct. 46, 56 L. Ed. 155.

In *Cory Bros. & Co., Limited* v. *United States*, 47 F(2) 607 (Second Circuit), the court entered a decree dismissing a libel and granting leave to file an amended libel in ten days. No amendment was filed within the ten days and thereafter libelant took an appeal. The United States Court of Appeals for the Second Circuit dismissed the appeal. Judges L. Hand, Swan and Chase in a *per curiam* opinion said:

> "It does not differ from an order sustaining a demurrer with leave to amend; *another order of absolute dismissal after expiration of the time allowed for amendment is required to make a final disposition of the cause. Such orders are not appealable. Clark* v. *Kansas City*, 172 U.S. 334, 19 S. Ct. 207, 43 L. Ed. 467; *City and County of San Francisco* v. *McLaughlin*, 9 F.(2) 390 (C.C.A. 9); *Western Electric Co.* v. *Pacent Reproducer Corp.* (C.C.A.) 37 F.(2d) 14."

There is, thus, a clear conflict between the Second and Seventh Circuit Courts of Appeals calling for the supervision of this Court.

The jurisdiction of the district court here did not automatically expire after twenty days when no amendment was filed. The Court of Appeals for the Seventh Circuit, the appellate court below, (in a case where *amendment was allowed ten years later*, *Fidelity Trust Co.* v. *Board of Education of City of Chicago*, 7 Cir., 174 F. 2d 642) held that where an order is interlocutory, the matter is *sub judice*, and "the District Court could at any time reconsider and reform its decree or any part thereof. *Marconi Wireless Tel. Co.* v. *United States*, 320 U.S. 1, at page 47, 63 S. Ct. 1393, 87 L. Ed. 1731."

We respectfully urge that the plaintiffs had the right to rely—as they did rely—on the *express* statements of the law that an order dismissing a complaint with leave to

amend is *sub judice*, under the control of the trial court, and not a final order; that the case was still pending there (*Cory Bros. & Co.* v. *United States*, 47 F. 2d 607). Until the suit was dismissed on March 25, 1957 (R. App. 33) there was no final and appealable order (*Missouri and Kansas Interurban R. Co.* v. *City of Olathe, Kansas*, 222 U.S. 185, 32 S. Ct. 46, 56 L. Ed. 155). The trial court had power to extend the time for amendment after the twenty days, and therefore the case was still pending in the trial court (*Clark* v. *Kansas City*, 172 U.S. 334).

The plaintiffs on March 25, 1957, for the first time, decided to stand on their complaint, as amended, and on leave of court filed a statement to that effect (R. App. 33). Whereupon, the final order dismissing the complaint was entered and the matter of costs settled (R. App. 33). The court of appeals below acknowledges in its opinion that this is in accordance with the law as established in the Eighth Circuit, citing *Riverside Oil and Refining Co.* v. *Dudley*, 33 F. 2d 749 (CA-8), and as established in the Tenth Circuit, citing *Crutcher* v. *Joyce*, 134 F. 2d 809 (CA-10). Thus, the Seventh Circuit is in conflict with the Second, Eighth and Tenth Circuits, additional reasons for allowance of certiorari here.

The defendants have not been prejudiced in anyway. They got the plaintiffs' money. The plaintiffs have the worthless securities. If the defendants wanted a final judgment entered earlier, *they* should have moved for judgment.

III.

THE DISTRICT COURT DID NOT INTEND TO TERMINATE THE LITIGATION UNTIL THAT COURT ENTERED THE ORDER SETTLING THE MATTER OF COSTS AND DISMISSING THE CAUSE OF ACTION

AND

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN HOLDING THAT THE DISTRICT COURT INTENDED TO TERMINATE THE LITIGATION AT AN EARLIER TIME IS IN CONFLICT WITH THE APPLICABLE RULINGS OF THIS COURT.

The court of appeals below erred in holding that the trial court on May 27, 1955, when it entered the order granting plaintiffs leave to amend in twenty days (R. App. 32), intended to terminate the litigation after the twenty days if no amendment were filed.

(a) The trial court expressly granted leave to amend on that day and clearly contemplated continued control of the cause subject to its further order and did not then terminate the cause (R. App. 32).

(b) The trial court did not provide in its order that the cause of action was to terminate on any contingency.

(c) The trial court had jurisdiction to allow extensions of time for amendment after the twenty days and the case remained open there. "Drawn to give effect to the principle that cases should, as far as possible, be determined *on their merits* and not on technicalities, the courts have given Rule 15 not lip service merely but full fealty". (*Copeland Motors Co.* v. *General Motors Corp.*, 199 F. 2d 566).

(d) The jurisdiction of the trial court did not automatically expire after twenty days when no amendment was filed. The Court of Appeals for the Seventh Circuit (in a case where amendment was allowed ten years later,

Fidelity Trust Co. v. Board of Education of City of Chicago, 7 Cir., 174 F. 2d 642) held that where an order is interlocutory, the matter is *sub judice*, and "the District Court could at any time reconsider and reform its decree or any part thereof." *Marconi Wireless Tel. Co. v. United States*, 320 U.S. 1, at page 47, 63 S. Ct. 1393, 87 L. Ed. 1731".

(e) On March 25, 1957, the trial court granted plaintiffs leave to stand on their complaint, as amended, (R. App. 33) thereby obviously regarding the cause as still pending and without a prior final order.

(f) On March 25, 1957, the trial court entered an order dismissing the cause of action. The trial judge obviously knew that the case was pending before him up to that time, or he would not have entered this final order, the one and only final order entered in the cause (R. App. 33).

(g) The trial judge did not file his opinion in the case until a time thereafter, that is, on May 21, 1957 (R. app. 40).

(h) Every doubt is to be resolved against finality of judgments for appeal (*Zoline's Federal Appellate Jurisdiction and Procedure*, p. 20, Sec. 21).

(i) Neither *Stewart* v. *Lincoln Douglas Hotel Corp.*, 208 F. 2d 379 nor *Asher* v. *Ryppa*, 173 F. 2d 16, cited in the opinion below, are authority for dismissing the appeal. For here, in the case at bar, as shown by the record, the trial judge did not intend to terminate the action until he dismissed the cause of action on March 25, 1957 (R. App. 33), the very opposite of the *Stewart* and *Asher* cases, *supra*. The sincerity of the trial judge's understanding that the case was still pending before him until March 25, 1957, *is shown by his judicial acts on the record* (R. App. 30, 31, 32, 33). He *treated* the case as *pending*.

(j) The cases of *United States* v. *Newbury Mfg. Co.*, 123 F. 2d 453 (CA 1) and *Kelly* v. *Delaware River Joint Commission*, 187 F. 2d 93 (CA 3), cited in the opinion below, do not apply here. Those cases involved situations where leave to amend was sought *after final judgments of dismissal of the cause of action* and in the *Newbury* case, even after notice of appeal was filed. Leave to amend had not been obtained there. In the case at bar, plaintiffs had asked for and obtained leave to amend in the trial court. And the case at bar, is not a situation where plaintiffs sought relief from a final, adverse judgment or order under Rule 60, *Federal Rules of Civil Procedure*. The order granting leave to amend was interlocutory and favorable to plaintiffs and kept the case pending, *sub judice* in the trial court. And the desirability of finality of litigation should not smother the right to seek and obtain substantial justice.

The ruling of the court below is in conflict with the applicable rulings of this Court.

In *United States* v. *Hark*, 320 U.S. 531, the question was, when did the time for notice of appeal begin to run? The docket showed an order entered on March 5, 1943, quashing an indictment. On March 31, 1943, the court signed an order quashing the indictment. The government appealed. Defendants contended that the appeal time ran from the first order and that the time for appeal had expired. The United States Supreme Court overruled that claim, saying:

> "The Judge was conscious, as we are that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted for a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence

of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran."

The court below has decided a federal question in conflict with the applicable decision of this Court, calling for the writ of certiorari.

IV.

THE COURT OF APPEALS OPINION BELOW MAKES IT VIRTUALLY IMPOSSIBLE TO KNOW WHEN THE TIME FOR FILING NOTICE OF APPEAL BEGINS TO RUN

AND

HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

The court of appeals opinion below says, "It is clear that during the 20 day period, the order of May 27, 1955 was not appealable, as the allowance of leave to amend precluded finality" (app. 12A). But the opinion further held that in the absence of the filing of an amendment, notice of appeal must be filed in thirty days of the order (app. 14A). (Rule 73, *Federal Rules of Civil Procedure* (app. 8A). The court of appeal below, in holding that the order during the first twenty days was not appealable, reduced the time for appeal to the last ten days of the thirty day period. This is a violation of Rule 73 (App. 8A), and raises important questions of federal law as to just what is the time for appeal and when does it begin to run.

The decision of the court of appeals, unless reversed, will increase the filing of cases in federal courts of appeals, for litigants cannot dare to rely on the once accepted rule that where leave to appeal is given the case remains open and pending until a final order is entered disposing of the

cause of action. Litigants must now rush to complete steps on appeal instead of allowing time for animosities to heal and settlement talks to be initiated. Plaintiffs here were never called upon to explain or given an opportunity to explain why they waited as they did for the entry of the final order dismissing the cause of action in the District Court. Thus there is nothing in the record as to what intimations were made by defendants to plaintiffs while the action was in the District Court that they would eventually be made whole. Plaintiffs have not been guilty of *laches*.

V.

THE COURT OF APPEALS OPINION BELOW SEVERELY REDUCES THE JURISDICTION OF DISTRICT COURTS, HARSHLY LIMITS LIBERALITY OF AMENDMENTS INTENDED BY RULE 15(a) FEDERAL RULES OF CIVIL PROCEDURE (App. 7A)

AND

IS IN CONFLICT WITH THE RULINGS OF THE UNITED STATES COURTS OF APPEALS FOR THE THIRD, FOURTH AND SIXTH CIRCUITS.

The court of appeals decision below holds that the district court lost jurisdiction and no longer had the case under its control at the expiration of the twenty days for filing the amendment allowed in the court order of May 27, 1955, and, having lost jurisdiction, the court of appeals below said that the later order dismissing the cause was void (App. 14A). If this decision is allowed to stand, *district courts are without jurisdiction of actions* and *without power to allow amendments or extend time for amendments* once a particular time given for filing an amendment expires, if the amendment for some reason was not filed. Such a ruling handcuffs district courts from doing justice and imposes a strictness in matters of pleadings more severe than the severest rigors of the common law.

The effect of the court of appeals decision below is *substantially to nullify Section 15(a) of Federal Rules of Civil Procedure*, a matter of great national importance. This Rule provides that after once amending as a matter of course, a party may amend his pleadings by leave of court (or written consent of the adverse party), *"and leave shall be freely given when justice so requires"*.

If the decision below is not reversed, district courts can not regard themselves as having power to grant amendments after the time allowed for filing expires. This goes to the operation of courts in the entire Federal system. As stated in *Canister Co., et al.* v. *Leahy, et al.*, (3rd Cir.) 191 F. 2d 255, United States district courts must be allowed wide latitude in permitting or rejecting amendment to pleadings. "The spirit in which a motion to amend pleadings should be approached is illustrated by Rule 15(a) of the Rules of Civil Procedure which provides that leave to file amendments and supplemental pleadings shall be freely given when justice so requires" (*Maryland Casualty Co.* v. *Rickenbaker*, (4th Cir.), 146 F. 2d 751).

In *McDowall* v. *Orr Felt & Blanket Co.*, 146 F. 2d 136, (6th Cir.) the Court of Appeals for the Sixth Circuit reversed a district court for disallowing an amendment to the complaint, since the amendment would not have worked prejudice to the defendant. The court said that Rule 15(a) "continues, confirms and emphasizes the practice in effect prior to its adoption, in which liberality in amendment was encouraged and favored, where no prejudice or disadvantage be suffered by the opposing side. *Norton* v. *Larney*, 266 U.S. 511, 45 S. Ct. 145, 69 L. Ed. 413; *Taylor Co.* v. *Anderson*, 275 U.S. 431, 48 S. Ct. 144, 72 L. Ed. 354; *In re Haskell*, 7 Cir., 73 F. 2d 879".

Wide discretion is to be given to the district courts to allow amendment to complaints, and the *burden is on the defendant* to show that prejudice would result (*Heath* v. *Phillips*, 201 F. 2d 220).

By ruling that the case ceased to pend and that the district court lost jurisdiction for all purposes when the amendment was not filed in the twenty days allowed by the order of May 27, 1955, Rule 15(a) is emasculated. The need to continue in force the uniform and liberal right to amend as formerly existed, and the need to avoid confusion in the law on this point, is of national need and importance and calls for the supervision of this Court.

VI.

THE ORDER DISMISSING THE CAUSE OF ACTION AND SETTLING THE MATTER OF COSTS WAS A FINAL AND APPEALABLE DECISION

AND

THE COURT OF APPEALS BELOW IN REFUSING TO HOLD THAT THE ORDER WAS A FINAL AND APPEALABLE DECISION WHICH DREW WITH IT A REVIEW OF THE INTERLOCUTORY ORDER DISMISSING THE COMPLAINT IS IN CONFLICT WITH THE RULINGS OF UNITED STATES COURTS OF APPEAL FOR THE THIRD AND FIFTH CIRCUITS.

There can be no doubt that the judgment dismissing the cause of action entered by the trial court on March 25, 1957 (R. App. 33) was a final order. The record discloses that this is the one and only order ever entered in the trial court dismissing the cause. At best, the order dismissing the complaint and granting leave to plaintiffs to file an amended complaint entered on May 10, 1955, (R. App. 30), is merely an interlocutory order, and not one specified in 28 U.S.C.A. Sec. 1292 (App. 6A) allowing certain interlocutory appeals. But even if the order, though interlocutory, were appealable, the law allows plaintiffs

to await the final judgment which dismisses the cause of action before filing notice of appeal, and then file notice of appeal from the final order. The notice of appeal so filed draws with it all previous orders in the cause and are then reviewed in the appeal.

> "One aggrieved by an appealable interlocutory decision need not appeal. He has a choice. He may appeal from the interlocutory decision or he may await a final judgment. On appeal from the final decision all interlocutory decisions may be reviewed". *Barron & Holtzoff, Federal Practice and Procedure*, Ch. 13, p. 359."

As the court said in *Victor Talking Machine Co. v. George*, (3rd Circuit) 105 F (2) 697 (Certiorari denied, 308 U. S. 611, rehearing denied 308 U. S. 638),

> "The aggrieved party may, therefore, await the final determination of the case and upon appeal therefrom raise all questions involved in the case. *A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co.*, 8 Cir., 95 F (2) 703. All interlocutory orders and decrees from which no appeal has been taken are merged in the final decree. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 36 S. Ct. 269, 60 L. Ed. 629, *Individual Drinking Cup Co. v. Errett*, 2 Cir., 297 F. 733; *Western Union Telegraph Co. v. United States and Mexican Trust Co. et al.*, 8 Cir., 221 F. 545; *Nashville Syrup Co. v. Coca-Cola Co.*, 6 Cir., 215 F. 527, Ann. Cas. 1915B, 358".

And as was stated in *Reed Construction Co. v. Virginia Metal Products Corp.*, (5th Circuit) 214 F (2) 127,

> "The final judgments for the defendant were the proper ones to be designated by the appellant in giving notice of appeal, and this is what was done. Such notice of appeal drew in question, and brought up to the appellate court, all prior rulings of the court that rendered that judgment, and all interlocutory orders and relevant matters that preceded it. *Roth v. Hyer*, 5 Cir., 142 F (2) 227, 228. Certiorari denied, 323 U.S. 712, 65 S. Ct. 38; 89 L. Ed. 573."

The plaintiffs relied upon the law as thus well settled and filed notice of appeal from the final decision entered herein on March 25, 1957, dismissing the cause of action and settling the matter of costs after plaintiffs with leave of court stood on their complaint as amended. (App. 33). This rule, if honored generally, would remove uncertainties as to when the appeal time begins to run.

The Court of Appeals below in dismissing the appeal rendered its decision in conflict with the United States Courts of Appeals for the Third and Fifth Circuits and from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision and clarification by allowance of the writ of certiorari.

CONCLUSION.

In view of the foregoing, we respectfully submit that the Court of Appeals opinion below is in conflict with the rulings of this Court and other circuit courts of appeals on important questions of federal law and practice; that the effect of the decision is to cause confusion and uncertainty in the law with resulting loss of substantial justice to citizens of the United States and will increase rather than decrease litigation in United States courts of review, unless the supervision and correcting authority of this Court is brought into use by granting the writ of certiorari.

Petitioners pray that the writ of certiorari to the Court of Appeals of the United States for the Seventh Circuit be allowed in this case, and that, on such review by this Court, the judgment of the United States Court of Appeals for the Seventh Circuit be reversed in its entirety or reversed and remanded with appropriate directions.

Respectfully submitted,

ZEAMORE A. ADEE,

Attorney for Petitioners.

APPENDIX.

No. 12048

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Friday, July 26, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Walter C. Lindley, Circuit Judge

HENRY M. JUNG, ET AL., ETC.,
Plaintiffs-Appellants,

vs.

K & D MINING CO., INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

The defendants having moved for a dismissal of this appeal on the jurisdictional ground that notice of appeal from the final decision of the trial court had not been filed within the statutory time limit, and upon consideration of the motion, files, and briefs.

IT IS ORDERED and adjudged by this Court that this appeal be, and the same is hereby, DISMISSED, with costs.

No. 12048

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Wednesday, August 14, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Walter C. Lindley, Circuit Judge

HENRY M. JUNG, ET AL., ETC.,
Plaintiffs-Appellants,

vs.

K & D MINING CO., INC., ET AL.,
Defendants-Appellees.

} Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED by the Court that the last sentence on Page 4 of the Opinion of this Court filed on July 26, 1957 be changed to read as follows:—

> "Consequently, as no amendment was filed within 20 days from the order of May 27, 1955, and no appeal from that order taken within 30 days, it is clear that this Court is without jurisdiction, and that the motion to dismiss must be granted. It is so ordered."

No. 12048

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Tuesday, August 20, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Walter C. Lindley, Circuit Judge

HENRY M. JUNG, ET AL., ETC.,
Plaintiffs-Appellants,

vs.

K & D MINING CO., INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED that the Motion for rehearing and to vacate the order dismissing the appeal, filed herein on August 9, 1957 be, and the same is hereby Denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed and typewritten pages contain a true copy of the

(1) Appendix to Plaintiffs-Appellants' Brief Filed July 2, 1957;

(2) Opinion of this Court Filed July 26, 1957;

(3) Judgment of this Court Entered July 26, 1957;

(4) Order of this Court entered August 14, 1957, modifying the Opinion of the Court; and

(5) Order of this Court entered August 20, 1957, denying the Motion for Rehearing and to Vacate the Order Dismissing the Appeal

in Cause No. 12048

HENRY M. JUNG, ET AL., ETC.,
Plaintiffs-Appellants,

vs.

K. & D. MINING CO., ET AL.,
Defendants-Appellees,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 25th day of October A. D. 1957.

SEAL

Kenneth J. Carrick
Clerk of the United States Court
of Appeals for the Seventh Circuit
By R. Hays Blanchard
Chief Deputy Clerk

Title 28, United States Code, Judiciary and Judicial Procedure

Chapter 81—Supreme Court

Sec. 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Chapter 133—Review—Miscellaneous Provisions

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Chapter 83—Courts of Appeals

Sec. 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Sec. 1292. Interlocutory decisions.

The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

Chapter 111 General Provisions

Sec. 1653. Amendment of pleadings to show jurisdiction.

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Rules, United States Court of Appeals, Seventh Circuit.

15(f) Jurisdictional Question. Whenever it appears that there is a substantial jurisdictional question in a cause pending on appeal, such question may be raised by either party by motion, to determine the issue as to jurisdiction in advance of hearing on the merits. Such motion shall be made as soon as possible, and when such motion is filed, all further proceedings shall be held in abeyance without further order until due disposition thereof has been made.

25(a) Procedure. Any party desiring a rehearing may, within 15 days after entry of judgment, file . . . a petition for rehearing.

Federal Rules of Civil Procedure

Rule 15. Amended and supplemental pleadings.

(a) Amendments. A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calandar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 73. Appeal to a Court of Appeals.

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to r[illegible] and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rules 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the Appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified,

for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant. As amended Dec. 27, 1946 and Dec. 29, 1948, effective Oct. 20, 1949.

The Securities Act, as amended, provides:

"The district courts of the United States, the United States courts of any Territory, and the United States District Court for the District of Columbia shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found." (U.S.C.A. Tit. 15, Sec. 77v).

In the

United States Court of Appeals

For the Seventh Circuit

No. 12048 — September Term 1956, April Session 1957

HENRY M. JUNG, et al., etc.,
Plaintiffs-Appellants,

vs.

K. & D. MIXING CO., INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 26, 1957.

Before DUFFY, *Chief Judge*, and LINDLEY, *Circuit Judge*.

LINDLEY, *Circuit Judge*. On May 10, 1955 the district court granted defendants' motion to dismiss plaintiffs' amended complaint, based upon an alleged violation of the Securities Act of 1933 and the Securities Exchange Act of 1934, for failure to state a valid claim. Though the order dismissed the complaint, it provided that plaintiffs have 20 days within which to file an amended complaint.

On May 27, 1955, plaintiffs moved that the order dismissing the complaint be vacated, and, in the alternative, that if the court should overrule plaintiffs' motion to vacate, the time for filing an amended complaint be extended for 20 days. On the same day, the court denied

this motion to vacate, but granted plaintiffs 20 days within which to amend. No amendment was ever filed. Indeed, plaintiffs took no action whatever until March 25, 1957, some 22 months after entry of the order. On that date, they filed a statement that they intended to stand on the amended complaint previously dismissed by the court. On the same day the court entered a second order dismissing the cause of action, from which plaintiffs appealed on April 16, 1957.

Defendants move to dismiss the appeal on the jurisdictional ground that notice of appeal from the final decision of the trial court had not been filed within the statutory time limit. They argue that the order dismissing the complaint with leave to amend entered May 27, 1955 became a "final decision" within the meaning of 28 U.S.C. §1291 upon expiration of the time for filing the second amended complaint fixed by the court.

In considering what constitutes a "final" decision, it has frequently been stated that an order dismissing a complaint does not become final and appealable until the plaintiff expressly elects to stand on his complaint and final judgment is entered in the court. *Crutcher* v. *Joyce*, 134 F. 2d 809 (CA-10); *Riverside Oil and Refining Co.* v. *Dudley*, 33 F. 2d 749 (CA-8). But, in *Stewart* v. *Lincoln-Douglas Hotel Corp.*, 208 F. 2d 379 (CA-7), this court retreated somewhat from rigid adherence to this doctrine. In that case, plaintiff appealed from an order dismissing his suit. Defendant moved to dismiss the appeal on the ground that the order of which complaint was made was of interlocutory character, urging that it lacked finality in that plaintiff had failed to elect expressly to stand on his amended complaint and, further, that no final judgment disposing of the cause of action had been entered. This

court, relying on its decision in *Asher* v. *Ruppa*, 173 F. 2d 10, 11, concluded that the order dismissing the amended complaint was "final" within the meaning of the statute, saying at page 381: " * * * it is clear that the District Court by its order dismissing the complaint intended to and did terminate the litigation; and that plaintiff by promptly taking this appeal elected to stand on this complaint." Thus, we conclude that there were two bases for the determination that the order was final, notwithstanding the absence of a formal judgment dismissing the cause of action, namely, the intent of the court and the action of the plaintiff.

In the case before us, there are two distinguishing characteristics not found in either of the *Stewart* or *Asher* cases. First, the court, in addition to granting the motion to dismiss, granted plaintiffs leave to file a second amended complaint within 20 days. It is clear that during the 20-day period, the order of May 27, 1955 was not appealable, as the allowance of leave to amend precluded finality. *Oppenheimer* v. *Young Co.*, 144 F. 2d 387 (CA-2); *American Broadcasting Co.* v. *Wahl Co.*, 121 F. 2d 412 (CA-2); *Atwater* v. *North American Coal Corp.*, 111 F. 2d 125 (CA-2); *Western Electric Co.* v. *Pacent Reproducer Corp.*, 37 F. 2d 14 (CA-2). As the court in *Western Electric Co.* v. *Pacent Reproducer Corp.*, *supra*, said at page 15: "Clearly the case remains pending in the District Court during the period within which amendment is permitted." However, this does not dispose of our issue, for we are still confronted with the task of determining whether the order of May 27, 1955 became final and appealable upon expiration of the time for making amendment. There is some authority for the proposition that another order is necessary after the time for amendment has passed in order to insure finality. See *Cory Bros. & Co.* v. *United*

States, 47 F. 2d 607 (CA-2). On the other hand, there is at least an implication in the *Western Electric Co.* case that the order automatically becomes final for the purpose of appeal upon expiration of the time for amendment.

Rather than follow rigid procedural formality, it is our duty to determine the intent of the court below, as suggested in our decisions in both the *Stewart* and *Asher* cases. In so doing, the circumstances surrounding the appeal must be taken into consideration. First it is necessary to remember that one of the policy considerations for the "final decision" rule is that of militating against piecemeal appeals. However, in the situation before us, where plaintiffs have failed to amend within the time granted and have taken no action for a period of almost 22 months, it can hardly be correctly urged that to dismiss the appeal will amount to obstruction of that policy. This is true, even keeping in mind the policy of liberality of amendment prescribed by Rule 15 (a), to the effect that leave to amend "shall be freely given when justice so requires", for, obviously, a reasonable time limit should always be imposed. *United States* v. *Newbury Mfg. Co.*, 123 F. 2d 453 (CA-1); *Kelly* v. *Delaware River Joint Commission*, 187 F. 2d 93 (CA-3). Paralleling the impropriety of piecemeal appeals, we have the policy of finality of litigation, which would be frustrated by plaintiffs herein, if, merely by their inactivity and in spite of it, they should be allowed to give new life to a dormant action.

True it is that, unlike the cases of *Asher* and *Stewart*, plaintiffs failed to appeal from the order of May 27, 1955 which affirmative conduct would have constituted an election by them to stand on the complaint. They pursued an opposite course, namely, refrained from taking any action

whatever for an unreasonable period of time. It is rightly urged that by such inaction, they chose to treat the order of the court of May 27, 1955 as final and consequently should be estopped from later action which would have the effect of reviving it. It is properly suggested that the order of March 25, 1957 be declared void. And, it is strongly and soundly urged, that the district court, by concluding that the amended complaint failed to state a cause of action, although granting leave to amend, intended nevertheless to terminate the litigation, if no amendment were filed within the time allowed. Consequently, as no amendment was filed within 20 days from the order of May 27, 1955, and no appeal from that order taken within 30 days, it is clear that this court is without jurisdiction, and that the motion to dismiss must be granted. It is so ordered.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Office - Supreme Court, U.S.
FILED
DEC 1 5 1957
JOHN T. FEY, Clerk

In the
Supreme Court of the United States

OCTOBER TERM, 1957

No. 619

HENRY M. JUNG, JOHN H. JUNG, ARTHUR E. SERWICH, HEDRICH-BLESSING, LTD., an Illinois corporation, and GILBERT R. SHELTON, individually and as trustee under agreement dated July 21, 1952, *Petitioners*,

vs.

K. & D. MINING CO., INC., a corporation of the State of Washington, M. L. DAVIES (sometimes known as MYRON L. DAVIES), ALICE F. DAVIES, GEORGE C. KOSMOS, individually and as trustee, and YVONNE KOSMOS, *Respondents*.

RESPONDENTS' REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

SAMUEL J. WETTRICK,
805 Arctic Bldg.,
Seattle 4, Washington.

FLOYD F. SHIELDS,
33 North La Salle Street,
Chicago 2, Illinois,
Attorneys for Respondents.

THE ARGUS PRESS, SEATTLE

In the
Supreme Court of the United States

OCTOBER TERM, 1957

No. 619

HENRY M. JUNG, JOHN H. JUNG, ARTHUR E. SERWICH, HEDRICH-BLESSING, LTD., an Illinois corporation, and GILBERT R. SHELTON, individually and as trustee under agreement dated July 21, 1952, *Petitioners*,

vs.

K. & D. MINING CO., INC., a corporation of the State of Washington, M. L. DAVIES (sometimes known as MYRON L. DAVIES), ALICE F. DAVIES, GEORGE C. KOSMOS, individually and as trustee, and YVONNE KOSMOS, *Respondents*.

RESPONDENTS' REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

SAMUEL J. WETTRICK,
805 Arctic Bldg.,
Seattle 4, Washington,

FLOYD F. SHIELDS,
33 North La Salle Street,
Chicago 2, Illinois,
Attorneys for Respondents.

THE ARGUS PRESS, SEATTLE

In the

Supreme Court of the United States

OCTOBER TERM, 1957

HENRY M. JUNG, JOHN H. JUNG, ARTHUR E. SERWICH, HEDRICH-BLESSING, LTD., an Illinois corporation, and GILBERT R. SHELTON, individually and as trustee under agreement dated July 21, 1952,
Petitioners,

vs.

K. & D. MINING CO., INC., a corporation of the State of Washington, M. L. DAVIES (sometimes known as MYRON L. DAVIES), ALICE F. DAVIES, GEORGE C. KOSMOS, individually and as trustee, and YVONNE KOSMOS,
Respondents.

No. 619

RESPONDENTS' REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

Counsel for petitioners has misconceived the real basis for the ruling of the Circuit Court of Appeals of the Seventh Circuit on the motion to dismiss the appeal as not timely.

That court does not lay down an absolute rule to the effect that an order is final or appealable in all instances where leave is granted to amend and no action is taken within the time allowed for that purpose. It recognizes that there are cases in which it is necessary to enter another order where leave to amend is granted, although, as we shall show later, these are mainly cases in which further action was contemplated before a final order could be entered.

In the present case, petitioners had been granted leave to amend twice after sustaining a motion to dismiss for want of jurisdiction, and after the second motion was sustained, they waited nearly two years before taking any further action. The sole purpose of this evidently was to revive the action and fix a new date from which to measure the time for appeal, and the District Court inadvertently entered an order on March 25, 1957, dismissing the cause of action for the third time. Under the circumstances, the Court of Appeals properly took the view that petitioners had previously shown an intention to stand upon their complaint and that the District Court intended that its ruling should be final unless further action was taken within the time allowed.

In reaching its conclusion, the Circuit Court of Appeals applied the rule of reason to this situation in order to serve the ends of fairness and justice. The court said that there were two bases for the determination that the order was final, namely, the intent of the court and the action of the plaintiff. The court then said:

> "Rather than follow rigid procedural formality, it is our duty to determine the intent of the court below, as suggested in our decisions in both the *Stewart* and *Asher* cases. In so doing, the circumstances surrounding the appeal must be taken into consideration. First it is necessary to remember that one of the policy considerations for the 'final decision' rule is that of militating against piecemeal appeals. However, in the situation before us, where plaintiffs have failed to amend within the time granted and have taken no action for a period

> of almost 22 months, it can hardly be correctly urged that to dismiss the appeal will amount to obstruction of that policy. This is true, even keeping in mind the policy of liberality of amendment prescribed by Rule 15 (a), to the effect that leave to amend shall be freely given when justice so requires, for, obviously, a reasonable time limit should always be imposed. [Citing cases.] Paralleling the impropriety of piecemeal appeals, we have the policy of finality of litigation, which would be frustrated by plaintiffs herein, if, merely by their inactivity and in spite of it, they should be allowed to give new life to a dormant action." (App. 10-A)

Following this the opinion states that plaintiffs failed to appeal from the order, which would have constituted an election by them to stand on the complaint, but pursued an opposite course, namely, refrained from taking any action whatever for an unreasonable period of time. It therefore sustained the contention that plaintiffs chose to treat the order of the court on May 27, 1955, as final, and consequently should be estopped from later action which would have the effect of reviving it.

It seems to us that the reasoning of the court as here set forth is sound and logical and the conclusion reached is certainly reasonable. There should be some finality to litigation and parties should not be heard to complain when they have slept upon what they regard as their rights for a wholly unreasonable length of time.

In the case of *Asher v. Ruppa*, 173 F.2d 10, the Court of Appeals for the Seventh Circuit said that when a motion to dismiss a complaint is sustained and the

complaint is dismissed, and the plaintiff does not desire to amend he should announce his election to stand on his complaint, let a final judgment be entered dismissing the cause of the action and then appeal from the judgment if he desires a review.

We think this is a reasonable view to take, and the logic of this situation is that if petitioners did not regard the order as final because leave to amend the complaint was granted, they should promptly have had an order entered making it clear that they intended to stand upon their complaint and then taken their appeal.

In view of what we have already said, we think it is useless to review all of the cases cited by the petitioners in their brief. None of them are like the present case where the single issue of jurisdiction in involved. In most of them, it was clear that further action was contemplated by the court regardless of what action the parties might take.

Thus in *Marconi Wireless Tel. Co. v. U.S.*, 320 U.S. 1, the Supreme Court simply held that where a patent case was held open pending an accounting the decision was not final.

In the case of *Clark v. Kansas City*, 172 U.S. 334, it was held that where the laws of Kansas permitted an amendment after overruling of a demurrer by the State Supreme Court and that court in deciding the case did not take the right away, the judgment of the state court was not final.

The case of *Cory Bros. & Co. v. U.S.*, 47 F.2d 697, is an old one decided in the second circuit in which ten days were given to amend and the court said that for aught

that appears the libelant may have amended its libel and may, should the amended libel be dismissed, hereafter appeal from that order. It therefore held that the order was not final and that a case may not be brought up in fragments. No such situation as that exists in the present case.

The case of *Fidelity Trust Co. v. Board of Education of the City of Chicago*, 174 F.2d 642, is cited as holding that where an order is interlocutory, the matter is *sub judice*. In that case, the Circuit Court held, that a decree granting an injunction, but providing for reference to a master to take an accounting and to make findings was not a final decree since it contemplated further action by the court. That case is obviously not like the present one. There the court clearly intended to hold the case open pending the master's report, whereas in the present case, the District Court undoubtedly intended that the litigation should be terminated unless the complaint was amended within the time allowed.

In *Western Electric Co. v. Pacent Reproducer Corp.*, 37 F.2d 14 (CA-2), twenty days were allowed for amendment of the complaint and the appeal was taken within ten days. Under the circumstances, the court said that clearly the case remained pending in the District Court during the period in which amendment is permitted. However, the situation was such that a second appeal might have been taken, and the court therefore held that another order was necessary to terminate the litigation. The court further said that "subject to exceptions not here applicable, the rule is that a judgment, to be appealable, should be final not

only as to all parties, but as to the whole subject matter and all the causes of action involved." The judgment of dismissal entered by the lower court in the present case was final not only as to all parties, but as to the whole subject matter and all the causes of action involved.

The sole question before the court in this proceeding is that of jurisdiction of the United States District Court in Chicago, where the court held that it did not have jurisdiction and dismissed the complaint. See memorandum opinion (R. App. 37).

Notwithstanding the fact that the merits of the case were not considered by the District Court or Circuit Court of Appeals and are not here involved, counsel for the petitioners in the last paragraph on page 15 of the petition states:

> "The defendants have not been prejudiced in any way. They got the plaintiffs' money. The plaintiffs have the worthless securities. If the defendants wanted a final judgment entered earlier, *they* should have moved for judgment."

In view of this statement we trust it will not be deemed out of order for us to say that the defendants have not "got the plaintiffs' money." The money contributed by the individual parties to the corporation was expended in developing a mine which was a joint venture of the parties. If plaintiffs' securities are worthless, so are the securities held by the individual defendants, and there is no more reason why defendants should reimburse plaintiffs for their loss in this venture than there is why plaintiffs should reimburse defendants for their loss.

With reference to the last sentence above quoted, this may be paraphrased by saying that, if plaintiffs wanted a judgment entered earlier, and did not regard the one that was entered as final, they should have moved promptly for judgment, as the Court of Appeals suggested in the *Asher* case, *supra*.

In view of the foregoing, we think the Circuit Court of Appeals was justified in holding that the appeal was not filed in time and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

SAMUEL J. WETTRICK,
FLOYD F. SHIELDS,
Attorneys for Respondents.

December 13th, 1957.